STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY MCNEAL,

Plaintiff-Appellee/Cross-Appellee/Cross-Appellant,

and

CHARLENE MCNEAL,

Plaintiff,

v

BLUE BIRD CORPORATION and BLUE BIRD BODY COMPANY,

Defendants-Appellants/Cross-Appellees,

and

HOLLAND MOTOR HOMES & BUS COMPANY and GEMB LENDING, INC.,

Defendants/Cross-Appellants,

and

PEACH HOLDING COMPANY, INC, BLUE BIRD COACHWORKS, LLC, COMPLETE COACH WORKS, CERBERUS CAPITAL MANAGEMENT, LP, COACHWORKS HOLDINGS, INC., and PEACH COUNTY HOLDINGS, INC.,

Defendants.

UNPUBLISHED
June 12, 2014

No. 308763
Ottawa Circuit Court
LC No. 08-062898-CK

Before: MURPHY, C.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

Defendants-appellants/cross-appellees, Blue Bird Corporation and Blue Bird Body Company (Blue Bird), appeal as of right from a final judgment in favor of plaintiff-appellee/cross-appellant, Anthony McNeal (plaintiff). Plaintiff cross appeals from the same order limiting his attorney fees to $100,000. Defendants/cross-appellants, Holland Motor Homes and Bus Company (Holland)and GEMB Lending Inc., appeal from the trial court's order denying their request for mediation sanctions. Holland does not challenge the trial court's interpretation or application of MCR 2.403(O) and seeks relief only in the event this Court reverses the final judgment and declares that Blue Bird was entitled to judgment as a matter of law. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The parties agree that the facts of this case for purposes of this appeal are not reasonably in dispute. In October 2006, plaintiff purchased a $838,483 luxury motor home from Holland – the 450 LXi. The motor home was manufactured by Blue Bird and plaintiff secured financing for the purchase from GEMB. In March 2008, Blue Bird announced a voluntary recall after learning that some of the motor homes exceeded permissible weight for the front suspension. Plaintiff took the motor home to Holland that month where the tires were changed. Holland advised plaintiff to take the motor home to Blue Bird's factory in Georgia so that the tie rods could be replaced. Plaintiff drove the vehicle to Blue Bird in April 2008. Blue Bird advised plaintiff that, even after the adjustments were made, the front axle was still too heavy. Engineers suggested that the problem could be fixed by reconfiguring the storage bays and changing the location of a generator. Plaintiff, angered by the fact that Blue Bird sold a defective vehicle, refused the repair. Instead, plaintiff wanted to wait for a new suspension system that Blue Bird was hoping to develop. However, in August 2008, Blue Bird advised plaintiff that an 18,000 pound suspension system was no longer feasible and the only option was to move the generator to one of the storage bays.

Plaintiff refused to tender the motor home for the necessary repairs. Instead, plaintiff and his wife filed suit against the various defendants in Oakland County in August 2008. The parties stipulated to remove the matter to Ottawa Circuit Court in October 2008. Charlene McNeal was dismissed as a plaintiff in September 2009. Plaintiff ultimately tendered the motor home for repair in November 2009, at which time the generator was moved to one of the storage bays. Plaintiff's third amended complaint alleged, *inter alia*:

> Count I: Breach of Express Warranty against Blue Bird
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> Count II: Breach of Implied Warranty against Blue Bird
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> Count III: Fraud/Misrepresentation against Blue Bird
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> Count IV: Innocent Misrepresentation against all defendants
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> Count V: Violation of Michigan's Consumer Protection Act (MCPA), MCL 445.901 *et seq*, against all defendants
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> Count VI: Violation of the Magnuson-Moss Warranty Act against Blue Bird

A jury trial was held from November 11, 2010 until November 18, 2010. Trial focused on whether Blue Bird knew that the motor home was defective at the time it was sold and whether the motor home remained defective even after the final repair. Plaintiff claimed that ample storage space was one of the factors that caused him to purchase the motor home in the first place and that he lost much of this storage space when the generator was moved to one of the storage bays. Plaintiff also claimed that the turning radius and general ride was compromised after the tie rods and tires were changed. Plaintiff further argued, even with the generator moved from the front to the back of the motor home, the front axle was still too heavy.

Following its decision on a motion for directed verdict, the trial court made the following statement providing a synopsis of the case (which includes over 1,000 transcript pages and 19 lower court records):

> And with the full knowledge of the risks associated with distilling the contents of a five-foot-long file and four days of trial into a few sentences, here it is in a nutshell. The motor home Plaintiff bought is not the same as the motor home he ended up with. The motor home that the Plaintiff bought was defective. Blue Bird claims to have fixed it, as was its obligation. But the fix did not give Plaintiff exactly what he originally ordered. The post-recall repaired vehicle was physically different than the vehicle Plaintiff purchased.
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> So here are the questions: Is the motor home substantially repaired? If not, what is the value of the motor home with the unrepaired defects compared to the value of the motor home without the defects; i.e., the motor home [Plaintiff] thought he was buying? Second, if the motor home has been substantially repaired, do the changes resulting from the warranty recall repair alter the value of the motor home? And if so, what is the value of the motor home after the recall repairs are completed compared to the value of the motor home that [Plaintiff] thought he was buying?
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> Third, if there are unrepaired defects and/or recall repairs that resulted in changes that permanently altered the usefulness and value of the motor home, are the changes to the usefulness of the motor home so substantial that the warranty has failed in its essential purpose, entitling [Plaintiff] to a full refund of the purchase price?
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> There are collateral issues like whether Blue Bird's actions violate the Michigan Consumer Protection Act or the Magnuson-Moss Warranty Act, thereby entitling Plaintiff to an award of attorney fees. But for the contract and fraud claims, the question comes down to a simple analysis. What did the Plaintiff think he was buying? In the end, what did the Plaintiff get? Is he entitled to damages for the difference in value, if any? Or if damages cannot compensate him, is he entitled to his money back with interest? And that, in my judgment, is the case in a nutshell.

The jury found for plaintiff on Counts II (breach of implied warranty), III (fraud/misrepresentation), and V (MCPA). The jury found for Holland on all counts and for Blue Bird on Counts I (express warranty) and VI (Magnuson-Moss Warranty Act). A final

judgment was entered on December 12, 2011. Plaintiff was awarded $209,483 against Blue Bird, plus judgment interest. Plaintiff was also awarded $100,000 in attorney fees under the MCPA, for a total judgment of $346,266. This appeal follows.

Blue Bird argues that it was entitled to judgment as a matter of law on all claims. Holland appeals from an order denying its request for mediation sanctions. Holland does not take issue with the trial court's interpretation of the court rule and only seeks relief in the event this Court reverses judgment for plaintiff and enters judgment for Blue Bird. Finally, plaintiff appeals the trial court's award of $100,000 in attorney fees under the MCPA, claiming that the amount was grossly inadequate.

II. BLUE BIRD'S APPEAL

Blue Bird argues that the trial court erred as a matter of law in denying summary disposition and not granting JNOV on plaintiff's claim for breach of implied warranty of merchantability. Blue Bird's argument is twofold: 1) there was no privity of contract between plaintiff and Blue Bird; and, 2) plaintiff's action was barred by the one-year limitations period to which the parties agreed. We disagree on both counts.

A. STANDARDS OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NWd 520 (2012). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998).

A trial court's decision on a motion for JNOV is likewise reviewed de novo. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003). In reviewing the decision, this Court must view the evidence and all legitimate inferences from it in the light most favorable to the nonmoving party to determine whether a question of fact existed. *Sniecinski*, 469 Mich at 131; *Livonia Bldg Materials Co v Harrison Constr Co*, 276 Mich App 514, 517-518; 742 NW2d 140 (2007). If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Genna v Jackson*, 286 Mich App 413, 417; 781 NW2d 124 (2010). Only if the evidence failed to establish a claim as a matter of law was JNOV appropriate. *Sniecinski*, 469 Mich at 131.

To the extent these issues involve the interpretation of a statute, our review is de novo. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205; 815 NW2d 412 (2012).

> Our primary goal when interpreting statutes is to discern the intent of the Legislature. To do so, we focus on the best indicator of that intent, the language of the statute itself. The words used by the Legislature are given their common and ordinary meaning. If the statutory language is unambiguous, we presume that the Legislature intended the meaning that it clearly expressed, and further construction is neither required nor permitted. [*Id.* at 205-206 (footnotes omitted).]

Finally, a trial court's award of attorney fees is reviewed for an abuse of discretion. *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.*

B. PRIVITY OF CONTRACT

Blue Bird argues that there was no privity of contract between the parties because plaintiff purchased the motor home from Holland and, absent privity of contract, plaintiff may not bring an action against Blue Bird for breach of implied warranty of merchantability for purely economic loss.

"In general, a warranty of merchantability is implied when the seller is a merchant of the goods sold and provides that the goods will be of average quality within the industry." *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 121; 839 NW2d 223 (2013). MCL 440.2314(1) specifically provides, that "[u]nless excluded or modified [under MCL 440.2316], a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." Very simply, a "seller" is defined as "a person who sells or contracts to sell goods," and a buyer is "a person who buys or contracts to buy goods." MCL 440.2103. And "[a] 'sale' consists in the passing of title from the seller to the buyer for a price . . ." MCL 440.2106.

We agree with plaintiff that there was contractual privity in this case and, therefore, we need not address whether privity of contract is necessary to maintain a cause of action for breach of implied warranty of merchantability for purely economic loss.

Blue Bird's limited warranty on its 450 LXi motor home provides, that "Blue Bird Coachworks, a division of the Blue Bird Body Company, warrants each 450 LXi to the original purchaser to be free from defects in material and workmanship under normal use and service within the limits described below . . ." The chassis body shell is warranted to be free from breaking or cracking for a period of five years or 50,000. "All other components" other than those warrantied by the manufacturers (diesel engines, automatic transmission, tires and batteries) are covered for a period of three years or 36,000 miles.

Regarding such express warranties, MCL 440.2313 provides that an express warranty may be created " . . .by the *seller* to the *buyer*. . . ." MCL 440.2313(1)(a) (emphasis added). This Court has held that "[a]n express warranty may be created only between a seller and a buyer, and any such express warranty becomes a term of the contract itself." *Heritage Resources, Inc v Caterpillar Financial Services Corp*, 284 Mich App 617, 634; 774 NW2d 332 (2009). As such, "we are compelled to conclude that where there is no contract, and therefore no bargain, there can be no express warranty under MCL 440.2313." *Id.* at 342. "Indeed, because an express warranty is a term of the contract itself, . . . we conclude that privity of contract *is*

necessary for a remote purchaser to enforce a manufacturer's express warranty." *Id.* at 638 n 12 (emphasis in original).[1]

This sentiment was previously stated in *Great American Ins Co v Paty's, Inc*, 154 Mich App 634; 397 NW2d 853 (1986) where, as here, the remote manufacturer issued an express warranty to the first retail purchaser. *Id.* at 636-637. The express warranty covering defects in material and workmanship established a "contractual relationship" between the parties. *Id.* at 641. In explaining why the plaintiff's claim sounded in contract and not in tort, this Court noted:

> Unlike *Auto-Owners* [*Ins Co v Chrysler Corp*, 129 Mich App 38, 43; 341 NW2d 223 (1983)] where the buyer and manufacturer had no contact whatsoever, the defendant here bound itself directly to the plaintiff's subrogor by offering an express warranty on the parts and workmanship of the combine to the first retail buyer. The warranty was obviously offered in an effort to induce the sale to buyers such as Mr. Douglas, and the costs associated with the warranty were presumably built into the price of the combine. If the fire which damaged the combine had occurred within the warranty's limitations period, Mr. Douglas could have insisted upon his rights under the warranty directly against the defendant and could have enforced those rights under the law. Under such circumstances, we must conclude that a "contractual relationship" existed directly between plaintiff's subrogor and the defendant. [*Great American Ins Co*, 154 Mich App at 641.][2]

There is no question that Blue Bird expressly warranted its 450 LXi to plaintiff. As such, there was contractual privity.[3] It follows that plaintiff could bring an action for breach of implied warranty of merchantability against Blue Bird.

C. ONE-YEAR LIMITATION PERIOD

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[1] The plaintiff's claims for breach of express warranty failed in *Heritage* because there was no contractual privity between the plaintiff and the remote manufacturer. The plaintiff's allegations arose from alleged oral statements by the manufacturer's representative.

[2] See also *Pack v Damon Corp*, 434 F3d 810 (CA 6, 2006), wherein the court, after concluding that vertical privity was not required to bring a breach of implied warranty claim concluded "Alternatively, the express warranty extended from Damon to Pack could suffice to support the requisite contractual relationship to bring an implied-warranty claim, as the court found in *Great American*. 397 N.W.2d at 857. The facts of the instant case are even stronger than the facts of *Great American* because here Damon made an express warranty directly to Pack, the original retail buyer." *Pack*, 434 F3d at 820, n 12.

[3] The fact that the jury specifically concluded that Blue Bird did not breach the express warranty does not change the fact that there was contractual privity. The underlying contract may not have been breached, but the contract nonetheless existed.

Blue Bird next argues that any breach of implied warranty accrued upon delivery of the motor home in October 2006 and, as such, plaintiff's claim was time-barred.

As previously stated, MCL 440.2314(1) provides that "[u]nless excluded or modified [under MCL 440.2316] a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." Warranties may nevertheless be excluded or modified by agreement of the parties. MCL 440.2316(2) provides that "to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous . . ." The relevant portion of the limited warranty in this case provides as follows:

> ANY IMPLIED WARRANTIES, INCLUDING THOSE OF MERCHANTABILITY OR FITNESS, ARE LIMITED TO THE WARRANTY PERIOD OF THIS WRITTEN WARRANTY. BLUE BIRD COACHWORKS SHALL NOT BE LIABLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES RESULTING FROM BREACH OF THIS WRITTEN WARRANTY OR ANY IMPLIED WARRANTY. NO PERSON, INCLUDING SALESPEOPLE, DEALERS, SERVICE CENTERS, OR FACTOR REPRESENTATIVES OF BLUE BIRD COACHWORKS, IS AUTHORIZED TO MAKE ANY REPRESENTATION OR WARRANTY CONCERNING COACHWORKS PRODUCTS EXCEPT TO REFER TO THIS LIMITED WARRANTY.
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> Blue Bird Coachworks reserves the right to make changes in design and changes or improvements upon its products without imposing any obligations upon itself to install the same option upon products theretofore manufactured. Defects shall be repaired promptly after discovery of the defect and within the warranty period as stated herein. All claims for warranty adjustments must be received by Blue Bird Coachworks not later than 30 days after the repair date, and shall be channeled through an authorized Blue Bird Coachworks dealer or factory representative. Any suit alleging a breach of this limited warranty or any other alleged warranty must be filed within one year of breach.

Blue Bird points to the language in the warranty that "[a]ny suit alleging a breach of this limited warranty or any other alleged warranty must be filed within one year of breach." It claims that the parties adjusted the statute of limitations, as permitted in MCL 440.2725.

Blue Bird argues that the breach occurred on delivery because implied warranties never extend to future performance, citing *Bacco Constr Co v American Colloid Co*, 148 Mich App 397; 384 NW2d 427 (1986). In *Bacco*, this Court noted:

> The Uniform Commercial Code, in MCL § 440.2725; MSA § 19.2725, provides a four-year period of limitation on an action for breach of any contract for sale of goods. Under this section, a cause of action accrues when tender of delivery is made "except that where a warranty explicitly extends to future performance of the goods" the cause of action accrues when the breach is discovered.

> We agree with plaintiff and defendants that the trial court erred in granting accelerated judgment on the express warranty claim, but hold that, since the implied warranty claim does not fall within the future performance exception of MCL § 440.2725; MSA § 19.2725, and the cause of action accrued more than four years before this action was commenced, the implied warranty claim is barred. [*Bacco*, 148 Mich App at 411-412.]

The Court provided no in depth analysis as to why it concluded that an implied warranty did not fall within the future performance exception and seems to have mentioned it in passing, finding that the matter was brought more than four years after the breach. Moreover, *Bacco* has limited precedential effect. MCR 7.215(J) ("A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.")

Blue Bird also cites *Highway Sales, Inc v Blue Bird Corp*, 559 F3d (CA 8, 2009). In that case, the Eighth Circuit concluded:

> Unlike express warranties, under Minnesota law, "[i]mplied warranties cannot, by their very nature, explicitly extend to future performance." . . . A breach of implied warranty occurs, and the claim accrues, "when tender of delivery is made . . ." Minn.Stat. § 336.2-725(2). Thus, the fact Blue Bird expressly warranted various components of the RV would be free from defects for specified periods of time after tender of delivery does not extend the accrual date for a breach of implied warranty claim. The parties agree tender of delivery of the RV occurred on July 31, 2003. Plaintiffs filed suit almost two years later, on July 15, 2005. Plaintiffs' breach of implied warranty claim is therefore untimely, unless Blue Bird is equitably estopped from asserting the statute of limitations defense. [*Highway Sales*, 559 F3d at 788-789.]

However, in a footnote the Court added: "Plaintiffs do not argue the implied warranty limitation is inconspicuous and do not assert implied warranties may extend to future performance under Minnesota law. Contrary to the dissent, we follow our general rule not to consider issues not raised by the parties or the district court, because such issues are waived." *Id.* at 789 n 5. Thus, once again, the analysis is less than complete.

We find the dissenting opinion in *Highway Sales* persuasive. After city various provisions of Minnesota's UCC requiring that limitations on warranties be conspicuous, the dissent looked to the warranty at issue, which, as Blue Bird touts, is substantially similar to the warranty in the present case:

> [T]he capitalized language dealt not with the lawsuit limitation period but rather created the overall length of the warranty period, including an implied warranty duration of two or three years, limited the nature of some recoverable damages, and specified which of Blue Bird's employees could make additional representations. It bears repeating that this capitalized portion of the contract did not at all deal with the period of time in which litigation could be commenced for breach of any of the warranties. Indeed, the statute of limitation reduction

language is found in a wholly new paragraph presented in significantly smaller, uncapitalized type. The new paragraph totally deals with a different subject than the capitalized portions. Blue Bird slips the limitation language into the fourth and last sentence of the new paragraph, which sentence reads, in isolation both as to location and subject matter, as follows: "[a]ny suit alleging a breach of this limited warranty or any other alleged warranty must be filed within one year of breach." There is no mention of either "implied warranty" or "merchantability" within or near this supposedly limiting language.

This crucial, purportedly limiting language violates Minn.Stat. Ann. § 336.1-201(b)(10)(A) and (B) of the UCC which, as earlier stated, requires capital letters equal or greater in size than the surrounding text or use of contrasting type, font or color or set-offs that call attention to the language. . . . As a matter of law, this limiting language relied upon by Blue Bird and the court is both inconspicuous and ambiguous. Accordingly, reviewing the matter de novo as we must, a four-year statute of limitations should apply. [*Highway Sales*, 559 F3d 797-798.]

The dissent then went on to address, for argument's sake, whether the claim was nevertheless barred by the one-year limitation. Again, the facts in *Highway Sales* are very similar to the one at issue in this appeal. The dissent noted:

Without argument, Blue Bird expressly warranted the RV to be free from defects in at least three ways. And, as conceded by both Blue Bird and the court, there is little doubt that the RV was "defective" when delivered and, according to the court, little doubt that the vehicle was never "merchantable" at any time relevant to this dispute, or, at least, a fact question not reachable through summary judgment exists on this issue.

In this regard, paragraph one of the "Limited Warranty" is of particular interest. It says "3. For a period of two (2) years from the date of delivery to the original purchaser [Blue Bird] warrants all other components installed by Blue Bird and Wonderlodge." Then, in the third and sixth paragraphs of the "Limited Warranty," Blue Bird reserves for this two-year period the right to attempt to cure any defects and make the vehicle merchantable as required by the implied warranty. Accordingly, if you credit Blue Bird's one-year statute of limitation affirmative defense and attempt to square it with the court's conclusions in this appeal, the one-year lawsuit limitations period for the implied warranties "expired" well before Blue Bird gave up its right to cure the defects which would have made the RV comply with the requirements of the implied warranty. This result flies in the face of approximately fifty years of consumer equity policy imbedded within the enactment of the Uniform Commercial Code in, by now, all fifty states, some territories, and a commonwealth. Blue Bird's clever penmanship and paragraph positioning cannot be allowed to overrule the policy pronouncements of the Uniform Commercial Code. [*Id.* at 798-799 (internal citations omitted).]

We agree. The express limited warranty in this case provided for five, three, or one year warranty periods and then specifically added that "ANY IMPLIED WARRANTIES, INCLUDING THOSE OF MERCHANTABILITY OR FITNESS, ARE LIMITED TO THE WARRANTY PERIOD OF THIS WRITTEN WARRANTY." Thus, the plain language of the limited warranty indicates that the implied warranty of merchantability is likewise subject to those periods. There is no reason to treat the limits on the express warranty differently from the limits on the implied warranty. Further, as the dissent in *Highway Sales* noted, allowing Blue Bird to avoid an implied warranty claim because of the one-year agreed upon limitation would have the absurd result of divesting plaintiff of the cause of action for breach of implied warranty well before Blue Bird even exercised its right to cure the defects in accordance with the express warranty. While neither the majority nor the dissent in *Highway Sales* has precedential value, we find the dissent's more methodical approach to the issue persuasive. Blue Bird should not be allowed to limit the time to bring suit in a manner that is not conspicuous to the buyer. And, by its own terms, the implied warranty of merchantability remains in effect "LIMITED TO THE WARRANTY PERIOD OF THIS WRITTEN WARRANTY." The breach in this case should not be deemed to have occurred at the time the motor home was tendered, but at the time the defect was discovered. The recall was issued in March 2008 and plaintiff filed suit in August 2008.

D. PLAINTIFF'S FRAUD AND MCPA CLAIMS

Blue Bird argues that it was entitled to JNOV on plaintiff's fraud and MCPA claims because, although the jury found Blue Bird liable for fraud, it also found a complete absence of damages. The jury found no difference in the fair market value of the motor home as purchased compared with the fair market value of the motor home as represented – both were $838,482.

With regard to fraud actions, our Supreme Court has explained:

> Michigan's contract law recognizes several interrelated but distinct common-law doctrines—loosely aggregated under the rubric of "fraud"—that may entitle a party to a legal or equitable remedy if a contract is obtained as a result of fraud or misrepresentation. These doctrines include actionable fraud, also known as fraudulent misrepresentation; innocent misrepresentation; and silent fraud, also known as fraudulent concealment. Regarding actionable fraud,
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> > [t]he general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery.
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> ***
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> Silent fraud has also long been recognized in Michigan. This doctrine holds that when there is a legal or equitable duty of disclosure, "[a] fraud arising

> from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood, and courts have not hesitated to sustain recoveries where the truth has been suppressed with the intent to defraud." [*Titan Ins Co v Hyten*, 491 Mich 547, 555, 557; 817 NW2d 562 (2012) (internal citation marks and footnotes omitted).]

"The law is clear in this state that for actionable fraud to exist the plaintiff must have suffered damage." *Mazzola v Vineyard Homes, Inc*, 54 Mich App 608; 221 NW2d 406 (1974). Moreover, "it is proper to construe the provisions of the MCPA 'with reference to the common-law tort of fraud.'" *Zine v Chrysler Corp*, 236 Mich App 261, 283; 600 NW2d 384 (1999) quoting *Mayhall v A H Pond Co, Inc*, 129 Mich App 178, 182-183; 341 NW2d 268 (1983). A person who suffers a loss under the MCPA is entitled to "actual damages or $250.00, whichever is greater . . ." MCL 445.911(2).

Blue Bird does not contest the quantum of proof for the jury's decision. Instead, Blue Bird focuses entirely on the jury's problematic calculation of damages. Blue Bird argues that the jury found a complete absence of damages and, if there was no difference in the fair market value of the motor home as purchased compared with the fair market value of the motor home as represented, Blue Bird should have received a JNOV on plaintiff's fraud and MCPA claims.

Blue Bird cites *UAW v Dorsey*, 268 Mich App 313, 708 NW2d 717 (2005) rev'd in part on other grounds 474 Mich 1097 (2006), to support its position. In *Dorsey*, a panel of this Court concluded that the defendants were entitled to a JNOV on the plaintiffs' fraud claim because there was no evidence presented on the element of damages. This Court concluded: "A review of the trial transcripts reveals that at trial, neither plaintiffs' damages expert nor any other expert gave testimony indicating that plaintiffs suffered damages as a result of defendants' misrepresentations or that defendants were unjustly enriched by the misrepresentations. This absence of proof became apparent when the jury returned a verdict in favor of plaintiffs on these claims, but did not award any damages." *Id.* at 333. Because damages were an element of the plaintiffs' claims, "the claims could not have been proven absent damages" and the defendants were entitled to JNOV on the plaintiffs' fraud claims. *Id.* at 334. However, the present case is distinguishable because, unlike *Dorsey*, the jury *was* presented with evidence of plaintiff's damages. The jury clearly found that the motor home, in its repaired state, was worth substantially less than when it was originally delivered, as expressed in the jury's findings on plaintiff's claim for breach of implied warranty. Thus, the jury was likely focused on the difference between the fair market value of the motor home at the time plaintiff took delivery and the fair market value of the motor home following the completion of the recall repairs. In any event, as the trial court noted, the MPCA clearly provides that a plaintiff is entitled to actual damages or $250, whichever is greater. The jury found that Blue Bird violated the MCPA and that plaintiff was harmed as a result. Thus, plaintiff was entitled to at least a nominal award of $250.

E. ATTORNEY FEES

Finally, Blue Bird argues that, even if judgment for plaintiff is affirmed, plaintiff was not entitled to an award of attorneys' fees under the MCPA where the jury awarded zero damages for the claim and plaintiff could not be considered a prevailing party.

MCL 445.911(2) provides that "[e]xcept in a class action, a person who suffers loss as a result of a violation of this act may bring an action to recover actual damages or $250.00, whichever is greater, together with reasonable attorneys' fees." In *Mikos v Chrysler Corp*, 158 Mich App 781; 404 NW2d 783 (1987), a panel of this Court concluded that a breach of an implied warranty of merchantability in a transaction involving the sale of goods constituted a violation of the MCPA. *Id*. at 782-783. That is because an implied warranty was a benefit promised "by law" and, from the consumer's standpoint, was "just as much a promised benefit as if the merchant itself made the promise." *Id*. at 784. Accordingly, this Court concluded that a breach of an implied warranty constitutes a "failure to provide the promised benefits" under MCL 445.903(1)(y) and, thus, under the MCPA, "[a] plaintiff who establishes breach of an implied warranty of merchantability is therefore entitled to attorney fees under the Consumer Protection Act." *Id*. at 784-785.

Blue Bird argues that *Mikos* has no applicability because it dealt specifically with MCL 445.903(1)(y) (failure to provide a promised benefit) whereas the jury in the present case was asked specifically whether Blue Bird violated MCL 445.903(1)(q) (failure to provide prompt delivery), (s) (failure to reveal a material fact), or (bb) (misstatement of fact). However, Blue Bird reads *Mikos* too narrowly. "Breach of an implied warranty constitutes a 'failure to provide the promised benefits,' *one* of the definitions of an unfair, unconscionable or deceptive method, act or practice under the Michigan Consumer Protection Act." *Mikos*, 158 Mich App at 785. The Court was not limiting its application to only those cases involving a failure to provide a promised benefit; that was merely one way of demonstrating "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful . . ." MCL 445.903(1). "A plaintiff who establishes breach of an implied warranty of merchantability is therefore entitled to attorney fees under the Consumer Protection Act." *Mikos*, 158 Mich App at 785. It follows that, under *Mikos*, a breach of an express or implied warranty constitutes a violation of the MCPA, entitling a plaintiff to recover reasonable attorney fees.

Furthermore, given the plain language of MCL 445.911(2), which allows "a person who suffers loss as a result of a violation of this act may bring an action to recover actual damages *or* $250.00, whichever is greater, together with reasonable attorneys' fees," it is clear that, unlike the requirements for a breach of warranty claim, the MCPA does not require the same quantum of proof on the element of damages. The MCPA allows recovery of either actual damages or $250, whichever is greater, if a jury concludes that a plaintiff suffered a loss when the defendant violated the MCPA. The jury in this case clearly concluded that plaintiff suffered damages under the MPCA. Thus, even if plaintiff failed to present sufficient evidence on the required element of damages under his breach of warranty claims, he was nevertheless entitled to $250 *and* his reasonable attorney fees. Because the statute imposes a set minimum damages award of $250, plaintiff was not required to prove actual damages.

III. HOLLAND'S APPEAL

As against Holland and GEMB, the case evaluation award was $0. The jury ultimately found in their favor and no-caused plaintiff's claims against them. However, the trial court concluded that, pursuant to MCR 2.403(O), Holland was not entitled to any case evaluation sanctions because plaintiff improved his position as to Blue Bird. On appeal, Holland does not pursue a claim that the trial court erred in interpreting the court rule. Instead, Holland "files this appeal to preserve its ability to request case evaluation sanctions if and when Blue Bird prevails

on appeal. If Blue Bird prevails on appeal, then the sole reason for the trial court's denial of case evaluation sanctions will be removed. Accordingly, Holland respectfully requests that, if this Court reverses the judgment against Blue Bird, this Honorable Court should also reverse the trial court's erroneous denial of case evaluation sanctions to Holland (and GEMB Lending)." Because we have declined to reverse the judgment against Blue Bird, we need not consider Holland's appeal.

IV. PLAINTIFF'S APPEAL

Relying on *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008), plaintiff argues that the trial court's $100,000 award for attorney fees was grossly inadequate where plaintiff's attorneys expended 1,581.90 hours on this case with a blended hourly rate of $228.25 an hour. Plaintiff argues that, instead of awarding plaintiff $361,078.50, the trial court punished plaintiff for failing to settle this dispute.

As previously stated, we review a trial court's award of attorney fees is reviewed for an abuse of discretion. *Moore*, 482 Mich at 516. "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.* The findings of fact underlying an award of attorney fees are reviewed for clear error. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 296; 769 NW2d 234 (2009). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made." *Id.* (internal quotation marks omitted). Any questions of law underlying an attorney fee award are reviewed de novo. *Id.* at 297.

"[A]ttorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception provides the contrary." *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 37-38; 576 NW2d 641 (1998) (footnote omitted). MCL 445.911(2) provides that "[e]xcept in a class action, a person who suffers loss as a result of a violation of this act may bring an action to recover actual damages or $250.00, whichever is greater, together with reasonable attorneys' fees."

Plaintiff contends that when determining a reasonable attorney fee under the MCPA, the trial court's failure to strictly adhere to the Court's opinion in *Smith* constituted an abuse of discretion. The Court in *Smith* first detailed what trial courts have been doing when calculating attorney fees, such as using the factors found in *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982), that were derived from *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973). The factors are: (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. *Smith*, 481 Mich at 529. The *Smith* Court also recognized that many trial courts had been consulting the eight factors found in Rule 1.5(a) of the Michigan Rules of Professional Conduct, which are: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer

or lawyers performing the services; and (8) whether the fee is fixed or contingent. *Id.* at 529-530. The Supreme Court further noted that trial courts have not limited themselves to only consulting the factors listed above. *Id.* at 530.

Recognizing that "some fine-tuning" was required, the *Smith* Court instructed that when determining an attorney fee pursuant to MCR 2.403, trial courts should first determine the "reasonable hourly rate [which] represents the fee customarily charged in the locality for similar legal services," and the trial court should rely on "reliable surveys or other credible evidence of the legal market." *Id.* at 530-531. The Court emphasized that the burden is on the fee applicant to produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Id.* at 531, quoting *Blum v Stenson*, 465 US 886, 895 n 11; 104 S Ct 1541; 79 L Ed 2d 891(1984). The Court then instructed that trial courts should multiply that number by the "reasonable number of hours expended in the case." *Smith*, 481 Mich at 531. The Court again emphasized that "[t]he fee applicant bears the burden of supporting its claimed hours with evidentiary support." *Id.* at 532. After this initial baseline figure has been calculated, "[i]n order to aid appellate review, a trial court should briefly discuss its view of the remaining [*Wood* and MRPC] factors" and whether such factors justify an upward or downward adjustment. *Id.* at 531.

However, the issue confronted in *Smith* was reasonable attorney fees in the context of case evaluation situations pursuant to MCR 2.403. *Smith*, 481 Mich at 530. MCR 2.403 is employed when "one party accepts the award and one rejects it . . .and the case proceeds to a verdict, the rejecting party must pay the opposing party's actual costs unless the verdict is, after several adjustments, more than 10 percent more favorable to the rejecting party than the case evaluation." *Id.* In terms of calculating the actual costs of the attorney fee, MCR 2.403(O)(6) specifically states that:

> For the purpose of this rule, actual costs are
>
> (a) those costs taxable in any civil action, and
>
> (b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.

As seen from the language of the court rule, there is a specific definition of a reasonable attorney fee, which initially depends upon a calculation of the hourly or daily rate.

In *University Rehabilitation Alliance, Inc v Farm Bureau General Ins Co of Michigan*, 279 Mich App 691, 700 n 3; 760 NW2d 574 (2008), this Court recognized the limited applicability of *Smith*. This Court was confronted with the issue of determining a reasonable attorney fee pursuant to the no-fault act, which provided that "an attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue…." MCL 500.3148. Ultimately, this Court held that the trial court's award of attorney fees based on a contingency fee agreement was reasonable. *University Rehabilitation Alliance, Inc*, 279 Mich App at 702. Specifically, this Court held that the trial court's multi-factor analysis under *Wood* was sufficient and that:

> *Smith* does not affect our analysis in this case of the question whether the trial court abused its discretion when determining a reasonable attorney fee under

> MCL 500.3148(1) [because] *Smith* addressed MCR 2.403(O)(6)(b), which explicitly requires that the reasonable-attorney-fee portion of actual costs be based on a reasonable hourly or daily rate as determined by the trial court…. [*Id.* at 700 n 3.]

Likewise in this case, case evaluation sanctions are not at issue. Moreover, the MCPA does not refer to a rigid formula to be used when calculating reasonable attorney fees.

Furthermore, while decided prior to *Smith*, this Court in *Smolen v Dahlmann Apartments, Ltd*, 186 Mich App 292; 463 NW2d 261 (1990), expressly confronted the issue of attorney fees and the MCPA. This Court specifically rejected "the application of any rigid formula, whether based on a contingent fee arrangement or an hourly formula, that fails to take into account the *totality of the special circumstances* applicable to the case at hand." *Id.* at 296-297 (emphasis added). Citing *Crawley*, 48 Mich App at 737, this Court concluded:

> [t]here is no precise formula for computing the reasonableness of an attorney's fee. However, among the facts to be taken into consideration in determining the reasonableness of a fee include, but are not limited to, the following: (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [*Smolen*, 186 Mich App at 295-296, quoting *Crawley*, 48 Mich App at 737.]

This Court concluded that "[w]hile the trial court should consider the guidelines of *Crawley*, it is not limited to those factors in making its decision." *Smolen*, 186 Mich App at 296. Also on the issue of how to assess attorney fees in the context of the MCPA, this Court in *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 97; 537 NW2d 471 (1995), referenced the MRPC 1.5(a) factors, and stated that a trial court "is not limited to these factors." *Id.* at 97.

Here, the trial court provided a lengthy explanation for its award of attorney fees:

> The question then becomes whether attorney fees in the amount of $361,078.50 are reasonable under the circumstances. They are not.
>
> ***
>
> At least three factors combined to needlessly prolong this litigation. First, plaintiffs refused to promptly tender their motorhome to the Bluebird defendants for repairs, choosing instead to pursue a claim in rescission, which ultimately failed. Second, plaintiffs refused to acknowledge that the Bluebird defendants substantially repaired their motorhome, claiming erroneously that the motorhome was still unsafe and illegal to drive. Finally, plaintiffs' [sic] inflated their claim for damages by seeking well in excess on $1,000,000.00, and by doggedly refusing to settle their dispute for a reasonable amount. In the end, the jury did exactly what it should have done. The jury calculated the difference between the value of the motorhome in its original condition and the value of the motorhome following the repairs performed by the Bluebird defendants.

> The Court also considers the outcome achieved by plaintiffs' attorneys. Plaintiffs did not prevail on any of the claims against the Holland Motorhomes defendants. At least 25 percent of the hours expended on this case by plaintiffs' attorneys are attributable to plaintiffs' failed claims against the Holland Motorhomes defendants. Additionally, plaintiffs failed to prevail at trial on two of the counts in the complaint, and failed to prove any damages as to two other counts. In the end, the plaintiffs succeeded only in proving that the value of the motorhome following the repairs performed by the Bluebird defendants was $209,483.00 less than the value of the motorhome in its original condition.
>
> Under all of the circumstances, the Court finds that the plaintiffs are entitled to attorney fees in the amount of $100,000.

The trial court's statement implies that it considered the most compelling factor was plaintiff's tactical maneuvering and its effect on the proceedings. This was not an abuse of discretion, because a trial court should consider the "totality of the special circumstances applicable to the case at hand" and "[w]hile the trial court should consider the guidelines of *Crawley*, it is not limited to those factors in making its decision." *Smolen*, 186 Mich App at 292, 296; See also *Jordan*, 212 Mich App at 97.

Nor did the trial court's award contravene the purposes of the attorney fee provisions in the MCPA, as plaintiff contends. Plaintiff is correct that the underlying purpose of the MCPA is to protect consumers, partly through awarding attorney fees to prevailing parties. *Jordan*, 212 Mich App at 97-98 ("[o]ne of the purposes behind both the [MMWA] and the MCPA is to provide, via an award of attorney fees, a means for consumers to protect their rights and obtain judgments where otherwise prohibited by monetary constraints.") Plaintiff has failed to illustrate that the attorney fee award in this case was unreasonable or contravened the purpose of allowing consumers to protect their rights. In *Jordan*, this Court held that a trial court's reduction of the attorney fee in a MCPA case solely based on the results obtained and the low value of the case undermined the remedial nature of the statutes. *Jordan*, 212 Mich App at 98. In this case, however, the trial court did not reduce the fee award based solely on those factors. Moreover, this Court in *Jordan* reaffirmed that, "[b]y our holding, we do not mean to suggest that a court must, in a consumer protection case, award the full amount of a plaintiff's requested fees. Rather, we hold that after considering all of the usual factors, a court must also consider the special circumstances presented in this type of case." *Id.* at 99.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly